

# Exhibit B

## Lisa Mitchell

---

**From:** Rae Lovko <rlovko@greenfirelaw.com>  
**Sent:** Tuesday, September 3, 2024 12:52 PM  
**To:** Lisa Mitchell  
**Cc:** Rachel Doughty  
**Subject:** Re: Rethink35 et al. v. Texas Dep't of Transp., No. 1:24-CV-00092

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Hi Lisa,

I am finalizing Plaintiffs' Motion to Supplement the Administrative Record and Request for Judicial Notice. The documents that are the subject of this motion are those that we previously met and conferred on. I also have a additional documents that I will be asking the court to address, all of which are identified in Plaintiffs' First Amended Complaint. They include:

1. Austin, Tex. Amendment #2 to Amendment No. 2 to Final Project Plan and Reinvestment Zone Financing Plan, available at <https://services.austintexas.gov/edims/document.cfm?id=298792>.
2. U.S. EPA, EPA to Reexamine Health Standards for Harmful Soot that Previous Administration Left Unchanged (June 10, 2021)
3. U.S. EPA, EPA Proposes to Strengthen Air Quality Standards to Protect the Public from Harmful Effects of Soot (January 6, 2023)
4. U.S. EPA, Proposed Decision for the Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (last updated February 3, 2023),
5. U.S. EPA, Supplement to the 2019 Integrated Science Assessment for Particulate Matter (May 2022)
6. U.S. Fish & Wildlife Services, Interactive Map (showing potential habitat for the Texas fatmucket), available at <https://www.fws.gov/species/texas-fatmucket-lampsilis-bracteata/map>.
7. Native freshwater mussel distribution in tributaries of the Colorado River downstream of Longhorn Dam near Austin, Texas, USA, Bianca J. Perez, City of Austin, TX 78704, Ashley Seagroves Ruppel, U.S. Fish and Wildlife Service, Liz Johnston, City of Austin, Andrew Clamann, City of Austin, Aaron Richter, Lower Colorado River Authority, Mateo Scoggins, City of Austin.
8. Austin, Tex. Resolution Adopting the "A City Plan for Austin, Texas" ("1928 Plan") Reflected in the Minutes of the Austin City Council Meeting Occurring on March 22, 1928
9. Austin City Council Regular Meeting Minutes (Mar. 22, 1928)
10. Deborah Archer, "White Men's Roads Through Black Men's Homes": Advancing Racial Equity Through Highway Reconstruction, Vanderbilt L. Rev. (V. 73:5/Oct. 2020)
11. Federal Interagency Working Group on Environmental Justice & NEPA Committee, Community Guide to Environmental Justice and NEPA Methods (Mar. 2019),

12. Federal Interagency Working Group on Environmental Justice & NEPA Committee, Promising Practices for EJ Methodologies I NEPA Reviews (Mar. 2016),
13. US EPA, Final Guidance for Consideration of Environmental Justice in Clean Air Act 309 Reviews (Jul. 1999),
14. City of Austin Comments on I-35 Capital Express Central (Dec. 29, 2020),
15. Austin, Tex. Resolution 202310-045 (October 19, 2023)
16. City of Austin Environmental Commission, Austin and the EPA's PM2.5 NAAQS (June 7, 2023),
17. Travis County, Commissioners Court-Approved Letter to Texas Department of Transportation (Sept. 26, 2023),
18. Austin City Council Members Zo Qadri, Chito Vela and Ryan Alter, Joint Statement on I-35 Update (July 31, 2023),
19. 88 FR 5558 et seq (EPA's proposed change to PM NAAQS)
20. 89 FR 16202 et seq (EPA change to PM NAAQS)

This extra-record evidence should either be included in the administrative record, or the Court should grant judicial notice of them because extra-record evidence may be reviewed when agency action is not adequately explained in the record and/or when further information is necessary to determine whether an agency considered all relevant factors. See *Medina Cnty. Env'tl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 247 (5th Cir. 2006); *Davis Mts. Trans-Pecos Heritage Ass'n v. United States Air Force*, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003). In NEPA cases, "courts routinely look outside the record" to determine whether the agency has ignored facts necessary to its consideration of environmental impacts and alternatives. See *City of Dall. v. Hall*, 2007 U.S. Dist. LEXIS 82080 at \*18 (N.D. Tex. Oct. 29, 2007). Further, where a plaintiff's claim is based on a failure to supplement an EIS pursuant to Section 706(1) of the APA, "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." See *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000); see also *S.F. Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002); *Bundorf v. Jewell*, 142 F. Supp. 3d 1138, 1144 (D. Nev. 2015).

Please let me know if you are amenable to any of these being included in the administrative record. I will be filing the motion on Wednesday, so I would appreciate a quick response if at all possible.

Finally, as regards Appendix T to the final environmental impact statement, I am unable to "click" on the figures with embedded images. That is, I cannot access any of the images. When you update the administrative record, can you replace this document with one that has working links or images? Much thanks!

Please feel free to call if you have any questions or concerns,

Rae

On Tue, Aug 20, 2024 at 4:21 PM Rae Lovko <[rlvko@greenfirelaw.com](mailto:rlvko@greenfirelaw.com)> wrote:

Hi Lisa,

Thank you for agreeing to include the email attachments. As regards the other documents that you will not be including in the Administrative Record, Plaintiff will be asking the Court to supplement the record to include many of these -- especially to the extent that are referenced and do appear to have been "decisional." I will try to narrow them down as best I can to avoid creating an unnecessarily voluminous administrative record.

Best,

Rae

On Fri, Jul 12, 2024 at 7:44 AM Lisa Mitchell <[Lisa.Mitchell@oag.texas.gov](mailto:Lisa.Mitchell@oag.texas.gov)> wrote:

Hello,

Our client has reviewed your email and the attachment and offers the following responses.

“As regards the administrative record, there are a number of documents missing before it should be considered complete. Attached is a list of documents that are identified in either the DEIS or FEIS but which are not part of the record. Can you please supplement the administrative record to include these?”

- DEIS pages 467-70 and 472-77: TxDOT will not be supplementing the administrative record with these documents as those documents are not decisional, are available from third parties, and their inclusion would create an unnecessarily voluminous administrative record.
- FEIS Appendix T: TxDOT will not be supplementing the administrative record with the materials included in Appendix T, as they are not decisional, they are attachments to a document prepared by the Texas Transportation Institute, the materials are available either online or from third parties, and their inclusion would create an unnecessarily voluminous administrative record.
- FEIS Appendix P: TxDOT will supplement the administrative record with its March 2023 Environmental Guide: Volume 2 Activity Instructions.

“In addition, the administrative record contains comment letters and emails but does not contain attachments that accompanied these comments. For example, Rethink Austin attached a significant number of documents pertaining to air pollution, health hazards, and more. All attachments should be included in the administrative record.”

- TxDOT will add these documents. TxDOT anticipates it will take approximately one month to gather these documents and prepare a supplement to be filed with the court.

Lisa

**Lisa McClain Mitchell**

Assistant Attorney General

Transportation Division

Office of the Attorney General of Texas

P.O. Box 12548 (MC-020)

Austin, Texas 78711-2548

Direct: (512) 936-1431

Fax: (512) 936-0888

[Lisa.Mitchell@oag.texas.gov](mailto:Lisa.Mitchell@oag.texas.gov)



**Confidentiality Notice:** The information contained in this email and any attachments is intended only for the recipient(s) listed above and may be privileged and confidential. If you are not the intended recipient and have received this message in error, please notify the sender immediately at the email address above and destroy any and all copies of this message.

---

**From:** Rae Lovko <[rlovko@greenfirelaw.com](mailto:rlovko@greenfirelaw.com)>

**Sent:** Wednesday, July 10, 2024 11:44 AM

**To:** Lisa Mitchell <[Lisa.Mitchell@oag.texas.gov](mailto:Lisa.Mitchell@oag.texas.gov)>

**Cc:** Rachel Doughty <[rdoughty@greenfirelaw.com](mailto:rdoughty@greenfirelaw.com)>; Ryan Bates <[rbates@batespllc.com](mailto:rbates@batespllc.com)>; Matt Gamboa-Lutz <[Matt.Gamboa-Lutz@oag.texas.gov](mailto:Matt.Gamboa-Lutz@oag.texas.gov)>; Aidan Read <[Aidan.Read@oag.texas.gov](mailto:Aidan.Read@oag.texas.gov)>

**Subject:** Re: Rethink35 et al. v. Texas Dep't of Transp., No. 1:24-CV-00092

I am following up on this request to complete the administrative record. As I will be out of the office for the rest of this week and next, please direct any response to Rachel Doughty.

Thank you.

On Fri, Jun 28, 2024 at 3:48 PM Rae Lovko <[rlovko@greenfirelaw.com](mailto:rlovko@greenfirelaw.com)> wrote:

As regards the administrative record, there are a number of documents missing before it should be considered complete. Attached is a list of documents that are identified in either the DEIS or FEIS but which are not part of the record. Can you please supplement the administrative record to include these? In addition, the administrative record contains comment letters and emails but does not contain attachments that accompanied these comments. For example, Rethink Austin attached a significant number of documents pertaining to air pollution, health hazards, and more. All attachments should be included in the administrative record.

Please let me know if you are willing to add these documents. We can thereafter address a briefing schedule.

Much appreciated,

Rae

On Fri, Jun 28, 2024 at 3:01 PM Lisa Mitchell <[Lisa.Mitchell@oag.texas.gov](mailto:Lisa.Mitchell@oag.texas.gov)> wrote:

Counsel,

Now that the administrative record has been filed, we should start discussing a briefing schedule for this case. Please let us know what you have in mind on timing and approach so we can discuss and then perhaps present a schedule to the Court.

I will be out of the office next week but will be back July 8 and will be back in touch then.

Thanks,

Lisa

**Lisa McClain Mitchell**

Assistant Attorney General

Transportation Division

Office of the Attorney General of Texas

P.O. Box 12548 (MC-020)

Austin, Texas 78711-2548

Direct: (512) 936-1431

Fax: (512) 936-0888

[Lisa.Mitchell@oag.texas.gov](mailto:Lisa.Mitchell@oag.texas.gov)



**Confidentiality Notice:** The information contained in this email and any attachments is intended only for the recipient(s) listed above and may be privileged and confidential. If you are not the intended recipient and have received this message in error, please notify the sender immediately at the email address above and destroy any and all copies of this message.

--

Rae Lovko, Esq.

**Greenfire Law, PC**

2748 Adeline Street, Suite A

Berkeley, CA 94703

T: 510.900.9502 x 710

[rlovko@greenfirelaw.com](mailto:rlovko@greenfirelaw.com)

PRIVILEGE AND CONFIDENTIALITY NOTICE

This communication constitutes an electronic communication within the meaning of the Electronic Communications Privacy Act, 18 U.S.C. Section 2510, and its disclosure is strictly limited to the recipient intended by the sender of this message. This transmission, and any attachments, may contain confidential attorney-client privileged information and attorney work product. If you are not the intended recipient, any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is STRICTLY PROHIBITED. Please contact me immediately by return e-mail or at 510-900-9502 x 2, and destroy the original transmission and its attachments without reading or saving in any manner.

--

Rae Lovko, Esq.

**Greenfire Law, PC**

2748 Adeline Street, Suite A

Berkeley, CA 94703

T: 510.900.9502 x 710

[rlovko@greenfirelaw.com](mailto:rlovko@greenfirelaw.com)

PRIVILEGE AND CONFIDENTIALITY NOTICE

This communication constitutes an electronic communication within the meaning of the Electronic Communications Privacy Act, 18 U.S.C. Section 2510, and its disclosure is strictly limited to the recipient intended by the sender of this message. This transmission, and any attachments, may contain confidential attorney-client privileged information and attorney work product. If you are not the intended recipient, any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is STRICTLY PROHIBITED. Please contact me immediately by return e-mail or at 510-900-9502 x 2, and destroy the original transmission and its attachments without reading or saving in any manner.

--

Rae Lovko, Esq.

**Greenfire Law, PC**

2748 Adeline Street, Suite A

Berkeley, CA 94703



T: 510.900.9502 x 710

[rlovko@greenfirelaw.com](mailto:rlovko@greenfirelaw.com)

PRIVILEGE AND CONFIDENTIALITY NOTICE

This communication constitutes an electronic communication within the meaning of the Electronic Communications Privacy Act, 18 U.S.C. Section 2510, and its disclosure is strictly limited to the recipient intended by the sender of this message. This transmission, and any attachments, may contain confidential attorney-client privileged information and attorney work product. If you are not the intended recipient, any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is **STRICTLY PROHIBITED**. Please contact me immediately by return e-mail or at 510-900-9502 x 2, and destroy the original transmission and its attachments without reading or saving in any manner.

--

Rae Lovko, Esq.

**Greenfire Law, PC**

2748 Adeline Street, Suite A

Berkeley, CA 94703

T: 510.900.9502 x 710

[rlovko@greenfirelaw.com](mailto:rlovko@greenfirelaw.com)

PRIVILEGE AND CONFIDENTIALITY NOTICE

This communication constitutes an electronic communication within the meaning of the Electronic Communications Privacy Act, 18 U.S.C. Section 2510, and its disclosure is strictly limited to the recipient intended by the sender of this message. This transmission, and any attachments, may contain confidential attorney-client privileged information and attorney work product. If you are not the intended recipient, any disclosure, copying, distribution or use of any of the information contained in or attached to this transmission is **STRICTLY PROHIBITED**. Please contact me immediately by return e-mail or at 510-900-9502 x 2, and destroy the original transmission and its attachments without reading or saving in any manner.